

No. 15652

IN THE
United States
Court of Appeals
For the Ninth Circuit

UNITED MERCURY MINES COMPANY,
Appellant,
vs.
BRADLEY MINING COMPANY,
Appellee.

BRIEF OF APPELLANT

*Appeal from the United States District Court
for the District of Idaho, Southern Division*

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*This is an appeal from the United States District
Court for the District of Idaho, Southern Division,
upon rehearing ordered in this case.*

STATEMENT OF THE CASE

This is an action brought by the plaintiff United Mercury Mines Company, hereinafter called "United" against Bradley Mining Company, hereinafter called "Bradley" for an accounting of royalties due under a written contract dated December 31, 1941 in which the plaintiff sought an interpretation of

the provisions of the contract and the proper and legal method of determining the amount of royalty due for values extracted and smelted at the Yellow Pine Smelter. Under the contract of December 31, 1941 (R. 12) United conveyed to Bradley certain mining claims in Valley County known as the Meadow Creek Group and the Hennessey Group, and in consideration thereof Bradley agreed to pay United "a royalty of five per cent (5%) on all net smelter returns, net revenue, and net mint returns, as defined herein, upon and for all minerals, ores, metals or values, of any and every kind and character, mined, extracted or taken from the --- mining claims, or any part thereof." (R. 15)

The parties defined net smelter returns, net revenue, and net mint returns as follows:

"By net smelter returns, as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a smelter, it being understood that the smelter will deduct its normal smelting charges and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted.

"By net revenue, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped, taken or produced from said properties, less marketing and shipping costs from Cascade, Idaho.

"By net mint returns, as used herein, is meant the amount paid by any United States Mint, Branch or

agency thereof, less all shipping and marketing costs from Cascade, Idaho.”

The payment of the royalty for all minerals, ores, metals, or values, hereinafter called “values” was to continue for a term of 999 years and so long thereafter as values may be extracted from the said mining claims. (R. 16)

In the performance of said contract, United, by and through sufficient conveyance, transferred to Bradley the claims constituting the Meadow Creek and Hennessey so that title to the said claims and all values therein vested absolutely in Bradley. (R. 409, 413)

In 1949 Bradley, at its own costs, constructed the Yellow Pine Smelter upon the said claims and thereafter proceeded to smelt therein its own concentrates produced from the said claims and thereafter sold quantities of their own smelted products to certain purchasers. (R. 409, 413)

The Yellow Pine Smelter was at all times solely owned by Bradley which operated the same at its own expense in the reduction of its own values. (R. 409, 413)

After the construction of the Yellow Pine Smelter approximately 55%, based on values, of the so owned concentrates were treated at the Yellow Pine Smelter and after completion of the smelting process certain of the products were sold to purchasers. (R. 400, 406)

As to the products from the Yellow Pine Smelter,

originating from the said mining claims, Bradley did not compute and pay royalties to United under the provisions of the net revenue clause, on the amount received from the sale of the end products (R. 412, 416), but computed and paid royalties under its own interpretation and its own application of the net smelter returns clause to the concentrates at the mouth of the smelter, without having received any amount of money whatever from any source whatever for the said concentrates.

Although Bradley has sold to purchasers certain salable products resulting from its operation of the Yellow Pine Smelter, which found origin from the said mining claims, it has not paid United any sums equal to 5% of the amount received by Bradley from the purchasers. (R. 412, 416)

That at the time of the erection or construction of the Yellow Pine Smelter there were no smelters located at or near Cascade, Idaho, or between Cascade, Idaho, and these mining properties.

To United's complaint (R. 3-26) Bradley filed its answer (R. 26-35) and on such complaint and answer, affidavits and interrogatories and answers thereto, all of which appear in the transcript of record on appeal of this court, No. 14750 the matter came on for pre-trial hearing on February 1, 1955, as a result of which a judgment of dismissal was entered in favor of Bradley and from which appeal was taken by United to this court on February 21, 1955. That on February 8, 1956 this court entered its opinion herein as Case No. 14705, which

opinion was subsequently modified by this court's opinion filed May 15, 1956 and now reported in 204 F. 2d 205, which opinion reversed the lower court and remanded the matter to the District Court. Thereafter, on March 19, 1957, the matter came on for trial before the Hon. Wm. C. Mathes, sitting without a jury and findings of fact, conclusions of law and judgment were entered therein on April 20, 1957, from which judgment appeal was taken to this court on May 20, 1957, and on the same day a cost bond filed. (R. 67-68)

The lower court's judgment of April 20, 1957 held inter alia that the net revenue provisions of the contract did not apply as contended by United, but that the net smelter provisions of the contract did apply as contended by Bradley with reference to minerals, ores, metals and values extracted from said mining claims and smelted at the Yellow Pine Smelter.

JURISDICTION

Jurisdiction of the District Court is based upon diversity of citizenship, United being a citizen of Idaho and Bradley being a citizen of California (R. 3, 27), and the amount in controversy, which exceeds, exclusive of interest and costs, the sum of \$3,000.00 (R. 10). Title 28, Section 1332, United States Code.

This court has jurisdiction to reverse the case on appeal by reason of Title 28, Section 1291 and 1294, United States Code and Rule 73 of the Federal Rules of Civil Procedure.

SPECIFICATIONS OF ERROR

I. The court erred in making the following findings of fact:

- (a) Paragraph XIX.
- (b) Paragraph XXI.
- (c) Paragraph XXII.
- (d) Paragraph XXIII.
- (e) Paragraph XXIV.
- (f) Paragraph XXV.
- (g) Paragraph XXVI.
- (h) That portion of Paragraph XXVII, as follows:

“and that in itself would be a construction contrary to the purpose of the contract and contrary to plaintiff’s avowed purpose at the time the contract was executed.”

(i) That portion of Paragraph XXVIII, as follows:

and in that contemplation the parties inserted in the contract the following provision:

‘Should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho, then there shall be deducted from the net smelter or reduction returns a fair charge for trucking from the mine to such smelter or reduction works.’”

- (j) Paragraph XXIX.
- (k) Paragraph XXXI.
- (l) Paragraph XXXIII.

- (m) Paragraph XXXIV.
- (n) Paragraph XXXV.
- (o) Paragraph XXXVI.
- (p) Paragraph XXXVII.
- (q) Paragraph XXXVIII.
- (r) Paragraph XXXIX.
- (s) Paragraph XL.
- (t) Paragraph XLI.

II. The Court erred in concluding:

(a) Under paragraph II of its conclusions of law that the proper and legal method for determining the amount of royalty due the plaintiff under "Conveyance, Royalty Agreement and Option" dated December 31, 1941 for minerals, ores, metals and values extracted from the mining claims described therein and smelted at the Yellow Pine Smelter of the defendant is by the use of "net smelter returns" provision as defined in the contract and that the plaintiff is not entitled to any royalty computed on the basis of the amount paid to the defendant by purchasers of salable products resulting from the smelting and reduction of minerals, ores, metals and values taken from said mining claims and smelted by the defendant at the Yellow Pine Smelter.

(b) Under paragraph III of its conclusions of law that the defendant does not owe plaintiff anything by way of royalties, or otherwise, for or on account of any ores, concentrates, metals or values taken from the mining claims described in said contract and processed at the Yellow Pine Smelter.

III. The Court erred in adjudging:

(a) In Paragraph I. of its Judgment, that the proper and legal method for determining the amount of royalties due the plaintiff under "Conveyance, Royalty Agreement and Option" dated December 31, 1941 for minerals, ores, metals or values extracted from the mining claims described thereon and smelted at the Yellow Pine Smelter of the defendant is by the use of "net smelter returns" provision as defined in the contract and that the plaintiff is not entitled to any royalty computed on the basis of the amount paid to the defendant by purchasers of salable products resulting from the smelting and reduction of minerals, ores, metals and values taken from said mining claims and smelted by defendant at the Yellow Pine Smelter.

(b) In Paragraph II. of its Judgment, that the defendant is not indebted to the plaintiff, and that the plaintiff is not entitled to recover from the defendant any monies by way of royalty, or otherwise, for and on account of any ores, concentrates, metals or values taken from the mining claims described in said "Conveyance, Royalty Agreement and Option" and processed at Yellow Pine Smelter.

STATEMENT OF ISSUES

The trial court erred in finding that the net smelter returns provisions of the contract of December 31, 1941, are applicable to the operations of the Yellow Pine Smelter (R. 45); and entering judgment in

accordance therewith (R. 65). The trial court erred in not finding that the net revenue clause of said contract is applicable to the operations of the Yellow Pine Smelter and in not entering judgment in conformity with such a finding.

ARGUMENT

First, let us look at the decisions of the court of May 15, 1956 wherein this court said:

“The ‘net smelter returns’ clause referred to by the District Court provides: ‘[Bradley shall] pay United . . . a royalty of five per cent (5%) on all net smelter returns. . . By net smelter returns, as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a smelter, it being understood that the smelter will deduct its normal smelting charges. . . By its terms this clause is limited to situations where ‘amounts are received [by Bradley] from outside smelters.’ ”

“We see no reason why, as a matter of law, the ‘net revenue’ clause could not be controlling.’ ”

It is United’s position that the foregoing states the law of this case with reference to the meaning of the ‘net smelter returns’ clause in the contract. This clause has been eliminated from consideration by the lower court because it is limited to situations

where amounts are received by Bradley from outside smelters, and the evidence is uncontradicted that Bradley never received any money from any outside smelter for the concentrates processed at its Yellow Pine Smelter and which originated from the mining claims solely owned by Bradley.

The evidence adduced by the defendant at the trial was aimed at only one purpose, namely, to insist that the "net smelter returns" clause of the contract was applicable to the operations at the Yellow Pine Smelter, regardless of the law of the case and its own admissions that it never received any amount from outside smelters for the portion of the concentrates from the mining claims processed at the Yellow Pine Smelter.

There was no attempt on the part of Bradley to show that the "net revenue" clause of the contract did not apply or could not apply, other than its insistence that the "net smelter returns" clause did apply.

The trial court followed Bradley's contentions, disregarding the opinion of this court dated May 15, 1956.

United's objections to certain findings and conclusions (R. 448) are based on the ground, among others, that so far as they attempt to sustain the "net smelter returns" clause they are irrelevant and immaterial in view of this court's decision of May 15, 1956.

The evidence submitted by Bradley at the trial of this cause, presented no matters which were not before this court at the time of its opinion of May 15,

1956. Bradley's evidence at the trial was before this court previously in the affidavits and pleadings, interrogatories and answers, requests for admissions and admissions, when it decided previous appeal No. 14705 by its decision of May 15, 1956.

At the trial Bradley presented no new questions that were not before the court previously presented no evidence to show that certain subjects of negotiation which were intended to be covered by the new contract were not in fact so covered; no evidence that either party to the contract of December 31, 1941, had to go outside of the document itself to determine if the individual fact was covered; no evidence that there were any particular elements or extrinsic facts or negotiations which were not dealt with in the contract.

In fact, all of the matters adduced by Bradley at the trial were mentioned, covered and dealt with in the contract itself. The contract of December 31, 1941, represents a total meeting of the minds of the parties thereto respecting all matters therein contained. And the contract contains their agreed definition of the terms "net revenue" and "net smelter returns" which are clear, plain and unambiguous. In fact, Bradley does not claim that the terms are uncertain, unintelligible or ambiguous.

The contract of December 31, 1941, is unique. It is entirely separate, distinct and apart from the usual lease or lease and option agreement known to the mining industry. There is no evidence of any other contract of this kind or the constructions of any other

contract of this kind. It stands out clear and plain that Bradley acquired all of the mining claims and the values therein in consideration of the payments of certain sums of money computed simply by taking a certain percentage of amounts received from the sale of values extracted from the mining claims to an outside smelter or a United States mint or a purchaser, regardless of the state of concentration or refinement.

It is immaterial under the precise terms of the contract whether smelting is classified in the industry as a part of mining or as a step beyond mining, for the simple reason that Bradley owns the values, regardless of the state of refinement, and has agreed to pay a royalty on the basis of money received from a sale thereof, to an outside smelter, a mint or a purchaser.

This court, in remanding this cause, ruled on the law of the case:

Accordingly, there is no different question arising on this appeal nor does the record present a different state of facts and thus the determination of this court of May 15, 1956 was controlling on the lower court and is controlling in this appeal. The essential facts and evidence, issues and pleadings on the subsequent appeal are exactly similar on this appeal and the record presents no materially different situation and the doctrine of the law of the case thus has application to the former decision and this appeal and is not affected because there are no altered circumstances and there must be more than merely cumulative evi-

dence or immaterial evidence.

5 C.J.S., page 1288, Sec. 1834. *Bodkin vs. Edwards*, 9th Circuit Court of Appeals, 265 F. 621. Affirmed 41 S. Ct. 268, 255 U.S. 221, 65 L. Ed. 595.

In the case of *Bodkin vs. Edwards*, *supra*, it is stated:

“It is a rule of law, no longer to be controverted in the circuit courts, that whatever has been decided upon on one appeal cannot be re-examined in a subsequent appeal of the same suit or action. Thus far, the determination upon the first appeal becomes the law of the case and *res judicata*, and henceforth cannot again be questioned in the same case by the same parties to the suit or their privies . . . * * *

“Apply the rule here and seeing that the subsequent proceedings present no additional questions material to the issues, the former opinion of this court is decisive of the case upon appeal.”

The record fails to disclose any reason why the net revenue clause of the contract as a matter of law is not controlling.

In conclusion United contends that this court, in its former holding of May 15, 1956, ruled out any applicability of the “net smelter returns” clause to the operations of the Yellow Pine Smelter and urges that the lower court erred in finding to which exception has been taken, and particularly in finding that

the “net smelter returns” provisions apply to this case, and in so concluding and entering its judgment to that effect.

Respectfully submitted,

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